No. 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

AARON HENRY ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

PETITION FOR REHEARING

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I

INTRODUCTION

Until the instant decision, we had assumed that the judgment of a state court would be affirmed on direct review if it rested upon an adequate state ground. We had also assumed that the states were free to apply and enforce their own rules of criminal procedure, including the "contemporaneous objection rule," provided that the rules themselves were neither arbitrary nor oppressive nor arbitrarily and capriciously applied.

Not two years ago, this Court revolutionized the scope of federal habeas corpus. (Townsend v. Sain, 372 U.S. 293; Fay v. Noia, 372 U.S. 391.) The results were immediate. In one year, the number of habeas corpus petitions filed by state prisoners in the federal district courts increased by 85.5%. (Henry v. Mississippi, 33 L.W. 4141, 4149, fn. 8.) Having opened Pandora's box and become dismayed, this Court has not seen fit to

close the box. Rather, it has opened another. This, we submit, is neither compelled by the Constitution, consonant with our federal system, nor conducive to the sound administration of criminal justice.

II

THE INSTANT DECISION IS UNNECESSARILY DESTRUCTIVE OF STATE PROCEDURAL RULES

The proper place to object to illegally seized evidence is at the trial. That is the purpose of the "contemporaneous objection rule," which this court has explicitly upheld. (*Henry v. Mississippi*, 33 L.W. 4141, 4147-4148.) The reason for the rule is obvious: It allows the state to elicit evidence bearing upon the lawfulness of the seizure, it allows the defendant to controvert that evidence, and it produces an informed ruling by the trial judge. Here, notwithstanding the fact that Henry's attorneys were aware of the state's "contemporaneous objection rule," this Court has remanded the case to the state court to determine whether by failing to object to the challenged evidence, Henry "knowingly waived" his right to challenge it. We question what useful purpose this could serve.

Upon the remand, the state court has three alternatives and three only. It might abandon the "contemporaneous objection rule," a rule this Court approves. It might find that Henry did not "knowingly waive" his right to challenge the evidence but insist on applying the rule, in which case its decision would no doubt be reviewed on federal habeas corpus and would no doubt be overturned. Or it might apply the rule, finding concurrently that Henry's failure to object constituted a "knowing waiver" of the right to object, in which case

again, its decision would no doubt be reviewed upon federal habeas corpus, though with results that cannot be predicted with any confidence.

This is Russian roulette with a vengeance. The state can maintain the integrity of its own procedural rule only by making an interlocutory decision. (*Townsend v. Sain, supra; Fay v. Noia, supra.*) That decision will not necessarily mean nothing, but it may mean "nothing much." (Mr. Justice Jackson, concurring in *Brown v. Allen*, 344 U.S. 443, 542.) It seems to us that this Court has required the institution of a procedure as unnecessary as the requirement, now happily abandoned, that a state prisoner file a petition for certiorari before seeking habeas corpus relief in the lower federal courts. (*Darr v. Burford*, 339 U.S. 200.)

The instant decision will require explicit and unmistakable evidence of a "knowing waiver" of the right to object to appear in the trial record. It will jeopardize on appeal innumerable cases where the strategy of the defense can be perceived only through inference. It will create a kind of procedural *renvoi* in which issues once thought settled or foreclosed at trial will be shuttled from the state courts to the federal courts and back to the state courts, transforming the appellate process into a long tangle of metaphysical complexities. We are deeply concerned by the prospect.

No one would begrudge anyone his day in court. But we respectfully submit that one day in court is enough. Bearing in mind that resolution by a state court of questions of "knowing waiver" may be reviewed on federal habeas corpus, it would be sanguine to suppose that dissatisfied state prisoners would rest content with an *ad hoc* state procedure. The federal backlog will not decrease. Upon the contrary, it will merely be post-

poned. We submit that due process of law does not require—indeed, that it condemns—so duplicitous and unnecessary a procedure for the vindication of constitutional rights that were never asserted at the trial.

In spite of Mississippi's contemporaneous objection rule, the majority opinion holds that the question of admissibility of the evidence was properly raised by petitioner's motion for a directed verdict at the close of the evidence and that, without the evidence of Chief Collins, if the evidence were otherwise sufficient to support a verdict, the motion might be denied by the trial court and the case submitted to the jury with a properly worded appropriate cautionary instruction. Such a rule not only does violence to orderly court procedures and the contemporaneous objection rule but would result in a system most iniquitous and in most cases likely to be in fact prejudicial to a criminal defendant. It is easy to visualize a defense lawyer permitting incompetent evidence to be admitted without objection and, even though a motion for a directed verdict would reach it, anyone with any criminal court experience knows that, regardless of any cautionary instruction, the evidence would most likely infect the minds of the jury and weigh the scales against the defendant. Additionally, the rule puts the prosecution on the horns of a dilemma when the State has evidence, as in the case at bar, as to which it is an open question in the State as to its admissibility. The District Attorney in the case at bar had no Mississippi precedent as to consent by a wife to the search of a husband's car and the only logical time to test this, as pointed out by Mr. Justice Harlan, is at the time offered.

The majority opinion recognizes that petitioner is bound by the deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy.

This rule was recognized also in Escobedo vs. Illinois, U.S. , 12 Led 2nd 977.

CONCLUSION

In view of the foregoing, it is respectfully requested that this Court grant a rehearing.

CERTIFICATE OF MERITS

I hereby certify that the foregoing petition is filed in good faith and not for the purpose of delay.

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have mailed a copy of the foregoing Petition for Rehearing to counsel of record as follows:

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by U. S. Mail, postage prepaid, by depositing same in the United States Mail Box in the New Capitol Building in the City of Jackson, Mississippi.

This the 10th day of February, A. D., 1965.

Assistant Attorney General